

The Department of Community Affairs (DCA) requests that the Civil Service Commission (Commission) consider the specialized credentials of employees serving in the titles of Construction Official, Sub-Code Official, and Construction Code Inspector 1 and 2 in administering a layoff.

By way of background, DCA presented a layoff plan to the Division of State and Local Operations (SLO) to be effective May 16, 2011, which targeted 30 permanent positions. Twenty-three positions targeted are in the subject titles, namely three Construction Officials, four Sub-Code Officials, seven Construction Code Inspectors 2, and nine Construction Code Inspectors 1. DCA submitted that, as a result of the economic downturn of the State and, in particular, the construction industry, its Division of Codes and Standards has seen a decline of revenue over the past four to five years. Thus, DCA indicated that a layoff of its employees in the subject titles is necessary to bridge the gap between its costs and revenues.

In the instant matter, DCA explains that employees are required by law to possess specific licenses issued by DCA to perform the duties of their position. *See N.J.A.C. 5:23-5.1, et seq.* (Licensing of Code Enforcement Officials). For example, an employee inspecting elevators is required to possess an elevator inspector license. Per the job specifications, a Construction Official must possess valid licenses as a Construction Official and a Sub-Code Official. A Construction Official must also possess a Highrise and Hazardous Specialist (HHS) code enforcement license in building, plumbing, electrical, elevator, or fire protection. A Sub-Code Official is required to have a valid Sub-Code Official license and a HHS code enforcement license in either building, fire protection, electrical, plumbing, boiler/pressure vessel and refrigeration, elevator, or amusement rides issued by DCA, "appropriate to the position." A Construction Code Inspector 2 is required to have a valid Industrial and Commercial Specialist (ICS) code enforcement license in either building, fire protection, electrical, plumbing, boiler/pressure vessel and refrigeration, elevator, or amusement rides issued by DCA, "appropriate to the position." A Construction Code Inspector 1 must hold a valid Residential and Commercial Specialist (RCS) code enforcement license in either building, fire protection, electrical, plumbing, or boiler/pressure vessel issued by DCA, "appropriate to the position." Examinations for these titles are open to individuals with any one of these licenses and individuals are ranked on the resultant eligible list based on their scores.

DCA maintains that the job specifications do not reflect the specific license required for a position. It is noted that the titles in question have not been designated as separate variant titles based on licensing.¹ Thus, Construction Code

¹ *N.J.A.C. 4A:8-2.1(d)* states that employees serving in a specialized credential variant title shall have title rights based upon the special credentialing, provided that the employees are serving in a specialized credential variant title on or before submission of the layoff plan, see *N.J.A.C. 4A:8-1.4*.

Inspectors 1 serve in the same title despite the employees' specific functions. However, employees are appointed for one specific licensed discipline based on the need of DCA at the time. Specifically, once an individual's name is certified from an eligible list, DCA states that it is permitted to bypass an individual, including disabled veterans and veterans, if that individual does not possess the license needed for the particular position. This process has been termed as "selective certification."

DCA requests that layoff rights be based on the licensed discipline rather than "straight seniority" where the least senior employee is displaced regardless of the license he or she possesses. For instance, DCA estimates that if layoffs are conducted based on the licensed discipline, only two employees holding amusement ride licenses will be impacted, as opposed to nine employees if the layoff is administered by seniority. DCA states that it has only 13 licensed ride inspectors and it would not be able to properly inspect the rides if nine employees with these licenses are displaced. Businesses, such as Great Adventure and Morey's Pier, will not be permitted to open. DCA emphasizes that it was permitted to appoint the employees by way of selective certification to positions with specific licensing requirements. Therefore, DCA asks that the Commission recognize DCA's legal mandate to have properly licensed staff and apply applicable layoff rules so that licenses are considered in conducting the layoff.

In response, the International Federation of Professional and Technical Engineers (IFPTE), Local 195, represented by Timothy J. Rudolph, President, asserts that to accommodate DCA's request is "unacceptable" and "will create an unfair procedure." It maintains that a specific license requirement is not contained in the job specifications for the titles. Moreover, IFPTE submits that the fairest basis to determine layoff rights is by way of seniority. Should DCA be concerned with the upcoming rides season, IFPTE recommends that DCA adjust its budget accordingly.

The Communications Workers of America (CWA), Local 1039, represented by Thomas Palermo, President, also submits that the layoff should be administered by way of seniority and "strongly disagrees" with DCA's request. It states that the CWA contract is "quite clear" in that seniority is the determining factor during a layoff. Article 28, Layoff and Recall – Career Service, states that "[j]ob classification seniority shall be a determining factor to be considered when identifying which permanent employees are to be laid off." Thus, CWA maintains that DCA's request should be denied.

CONCLUSION

N.J.S.A. 11A:8-1(a) in pertinent part provides that a permanent employee may be laid off for economy, efficiency or other related reason. The Commission shall adopt rules to implement employee layoff rights. *N.J.S.A.* 11A:8-1(b) states that permanent employees in the service of the State or a political subdivision shall be laid off in inverse order of seniority. *N.J.A.C.* 4A:8-1.1(b) provides that the Commission shall determine seniority and shall designate lateral, demotional, and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to affected parties. When employees are granted demotional title rights, the employees shall be entitled to exercise these rights regardless of whether they have greater or less seniority than the employees

against whom they are exercising such rights. *See N.J.A.C. 4A:8-2.2(h)*. Further, *N.J.S.A. 11A:8-1(e)* provides that:

For purposes of determining lateral title rights in State and political subdivision service, title comparability shall be determined by the [C]ommission based upon whether the: (1) titles have substantially similar duties and responsibilities; (2) education and experience requirements for the titles are identical or similar; (3) employees in an affected title, with minimal training and orientation, could perform the duties of the designated title by virtue of having qualified for the affected title; and (4) special skills, licenses, certifications or registration requirements for the designated title are similar and do not exceed those which are mandatory for the affected title. Demotional title rights shall be determined by the [C]ommission based upon the same criteria, except that the demotional title shall have lower but substantially similar duties and responsibilities as the affected title. *See also, N.J.A.C. 4A:8-2.1(a) and (b)*.

Additionally, a Construction Official, Sub-Code Official, Construction Code Inspector 2, and Construction Code Inspector 1 have class codes of 26, 25, 23, and 22, respectively. Thus, a Construction Official is considered the highest title for layoff purposes.

In the instant matter, DCA requests that the title rights for the subject titles be determined based on the specific license required for each targeted position. IFPTE and CWA submit that seniority should be the only consideration in implementing the layoff. CWA presents that its contract designates seniority as the determining factor. However, it must be emphasized that the Commission does not have jurisdiction to enforce or interpret items which are contained in a collective bargaining agreement negotiated between the employer and the majority representative. *See In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson*, Docket No. A-1980-99T1 (App. Div., May 8, 2001). The proper forum to bring such concerns is the Public Employment Relations Commission. *See N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-5.4(c)*. Nonetheless, it is noted that Article 27, Seniority, of the CWA contract indicates that:

This Article shall not apply to the computation or application of seniority in determination of individual rights administered by the Department of Personnel² such as layoff and promotional rights. In such circumstances, seniority determinations and applications shall be determined by the Department of Personnel.

Moreover, contrary to IFPTE's statement, the job specifications indicate that an employee must possess a license as "appropriate to the position." Thus, there is a specific requirement for each position. Further, the discipline of the position was established by the selective certification process. No eligible was appointed unless

² On June 30, 2008, Public Law 2008, Chapter 29 was signed into law and took effect, changing the Merit System Board to the Civil Service Commission, abolishing the Department of Personnel and transferring its functions, powers and duties primarily to the Civil Service Commission.

he or she possessed the required license for the position. Given the history of appointments to these titles, and the discrete assignments based on licensure requirements, it appears that the subject positions are utilized *as if* the employees are in separate titles, based on their respective disciplines. In addition, DCA has persuasively described adverse consequences of failing to provide layoff rights based upon the licensed discipline. Accordingly, for purposes of conducting this layoff, the employees in the assigned disciplines may be considered as serving in separate titles.

Therefore, in determining layoff rights, *N.J.S.A. 11A:8-1(e)* can be applied. Specifically, in order to be deemed related, for lateral or demotional title rights purposes, “special skills, licenses, certifications or registration requirements for the designated title are similar and do not exceed those which are mandatory for the affected title.” Although employees may be serving in the same named title of Construction Code Inspector 1, a Construction Code Inspector 1 who performs plumbing inspections cannot inspect rides unless he or she has an amusement ride license. Therefore, lateral and demotional title rights may only be exercised within the licensed discipline. For example, a Sub-Code Official charged with supervision of field inspection of amusement rides may only displace another Sub-Code Official performing the same function as both positions require an amusement ride license. This Sub-Code Official will also have demotional title rights to Construction Code Inspectors 2 and 1 positions so long as those positions require the amusement ride license. Additionally, seniority remains a factor in the layoff as the least senior employee in the targeted disciplined title will first be affected.

As for demotional prior held title rights, *N.J.A.C. 4A:8-2.2(f)* states that demotional rights may extend beyond the employee’s demotional title rights to include any title previously held on a permanent basis within current continuous service. Displacement may be made only on the basis of greater permanent continuous service except when a provisional or probationary employee is serving in the previously held title. In such cases, the provisional or probationary employee shall be subject to displacement. The finding of the Commission does not, however, preclude the exercise of demotional prior-held title rights outside of the current discipline as long as the subject employee has a valid license. For example, if the Sub-Code Official with the amusement ride license previously served in a Construction Code Inspector 2 position which required an electrical license **and** the Sub-Code Official has a valid electrical license at the time of layoff, the Sub-Code Official may be able to exercise a prior held demotional title right to the electrical license position of Construction Code Inspector 2. Furthermore, the displaced employees will be placed on special reemployment lists for their title and all applicable lateral and demotional titles. The employees shall be certified by title and not by license. Should an employee subsequently receive a license, he or she may be appointed despite the fact that the employee did not hold the license at the time of layoff. Thus, selective certification may be applied in disposing of the special reemployment list.

In conclusion, the Commission finds that based on the statutory requirements of *N.J.S.A. 11A:8-1(e)*, the subject titles cannot be considered to have lateral or demotional title rights to each other unless the licensing requirements are met. Accordingly, the layoff of DCA employees must be administered by way of seniority in the licensed discipline.

ORDER

Therefore, it is ordered that this request be granted.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.